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Supreme Court of The United States

JANUARY TERM 1970

No. 1129

ROBERT SLATER,

Respondent,

v.

MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased, and

THE COMMUNITY STATE BANK, HUNTINGTON, INDIANA, Administrator of the Estate of Donald H. Stoffel, deceased,

Petitioners,

GEORGE SLATER,

Respondent,

v.

MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased, and

THE COMMUNITY STATE BANK, HUNTINGTON, INDIANA, Administrator of the Estate of Donald H. Stoffel, deceased,

Petitioners.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Petitioners.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

(Tr. in No. 668 A 101, pp. 71-77)

STATE OF INDIANA)
) SS:
COUNTY OF KOSCIUSKO)

IN THE KOSCIUSKO CIRCUIT COURT

ROBERT SLATER,
Plaintiff

-vs-

NO. C-67-683

MARK E. STOFFEL, ADMINISTRATOR OF THE ESTATE OF BERNARD J. STOFFEL, deceased,

THE COMMUNITY STATE BANK, HUNTINGTON, INDIANA, ADMINISTRATOR OF THE ESTATE OF DONALD H. STOFFEL, deceased,

Defendants.

MOTION FOR SUMMARY JUDGMENT

Defendants, Mark E. Stoffel, Administrator of the Estate of Bernard J. Stoffel, deceased, and The Community State Bank, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased, hereby separately and severally move, pursuant to § 2-2524, Burns' Ind. Stats. (1966 Sp. Supp.), that the Court grant them summary judgment in this cause on the following grounds, to-wit:

1. On December 2, 1959, plaintiff, Robert Slater, filed his Complaint For Damages in the United States District Court for the Northern District of Indiana, Fort Wayne Division, seeking to recover damages from defendants herein for personal injuries arising out of the same, iden-

tical motor vehicle accident which forms the basis of his Complaint For Damages in this cause. Said Complaint For Damages filed in the United States District Court for the Northern District of Indiana was docketed as Civil Action No. 1196 on the Docket of said Court. On the same date, Summons was issued in said civil action by the Clerk of the United States District Court for the Northern District of Indiana, directed to defendants, which Summons was placed in the hands of the United States Marshal for the Northern District of Indiana on December 4, 1959, and duly served by said Marshal on defendants, along with a copy of plaintiff's complaint in said cause, on December 8, 1959.

2. Defendants thereafter appeared in the United States District Court for the Northern District of Indiana in response to said Summons and complaint, and, after certain proceedings were had therein, filed in said Civil Action No. 1196 their Answer and Additional Affirmative Paragraph of Answer setting up as a defense to the action the failure of plaintiff to comply with the provisions of Acts 1953, ch. 112, §§ 1401, 1402, being §§ 7-801, 7-802, Burn's Ind. Stats. (1953 Repl. Ed.), governing the filing of claims against the estates of defendants' respective decedents, Bernard J. Stoffel and Donald H. Stoffel, and further alleging that plaintiff's action was forever barred for the reason that plaintiff had wholly failed to comply with the provisions of said statutes in that he had never filed his claim against either of said estates in the manner and form, or within the time, prescribed by said statutes.

Note. An identical motion for summary judgment was filed in the Kosciusko Circuit Court in No. C-67-682, the *George Slater* Case. (Tr. in No. 668 A 102, pp. 70-76) It has not been included herein in the interest of brevity

3. Plaintiff thereafter filed a Motion To Strike said defenses from defendants' Answer and Additional Affirmative Paragraph of Answer on the ground that they were insufficient as a matter of law to bar plaintiff's action. On June 29, 1962, the United States District Court for the Northern District of Indiana sustained said Motion To Strike and ordered said defenses stricken, but, finding that its Order "involved a controlling question of law as to which there is substantial ground for difference of opinion," and "that an immediate appeal from the order may materially advance the ultimate termination of the litigation," authorized an immediate appeal to the United States Court of Appeals for the Seventh Circuit "subject to the discretion and permission" of said Court.

4. Upon defendants' petition to the United States Court of Appeals for the Seventh Circuit, an appeal from the District Court's Order of June 29, 1962 was allowed; and, on February 8, 1963, after a full consideration of the cause, the United States Court of Appeals for the Seventh Circuit reversed the decision of the District Court striking said defenses and held that each of said defenses was sufficient as a matter of law to bar plaintiff's action, including the defense that plaintiff's action was forever barred by reason of his failure to comply with said statutes.

On March 6, 1963, the United States Court of Appeals denied plaintiff's petition for a rehearing of said cause.

5. Thereafter, the United States Court of Appeals for the Seventh Circuit Court issued its Mandate and Corrected Mandate to the United States District Court for the Northern District of Indiana, Fort Wayne Division, reversing said decision of the District Court of June 29, 1962, which Mandate and Corrected Mandate were received by, and filed in, the District Court on July 11, 1963.

6. Plaintiff thereafter filed his Joint Petition For A Writ Of Certiorari in the Supreme Court of the United States, seeking to have said Court review the decision of the United States Court of Appeals for the Seventh Circuit, which petition was denied by the Supreme Court of the United States on October 14, 1963.

7. On July 31, 1963, following receipt by the United States District Court for the Northern District of Indiana, Fort Wayne Division, of the Mandate and Corrected Mandate of the United States Court of Appeals for the Seventh Circuit, defendants filed in the District Court their Motion For Summary Judgment in said Civil Action No. 1196, it being admitted that plaintiff had never complied with the provisions of Acts 1953, ch. 112, §§ 1401, 1402, being §§ 7-801, 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), which motion the District Court granted on November 20, 1963, following said denial by the Supreme Court of the United States of plaintiff's Joint Petition For A Writ Of Certiorari, and ordered the Clerk of the United States District Court for the Northern District of Indiana to enter judgment for defendants, and each of them, in accordance with such ruling.

8. On November 20, 1963, the Clerk of the United States District Court for the Northern District of Indiana purported to enter Judgment for defendants in said Civil Action No. 1196, but, due to clerical error, omitted certain essential parts therefrom, and on July 13, 1967 the United States District Court for the Northern District of Indiana corrected said Judgment by its Judgment Nunc Pro Tunc Amending And Correcting Judgment Entered By The Clerk On November 20, 1963, and thereby rendered final judgment in said cause that plaintiff take nothing by his said Complaint For Damages and in favor of defendants,

and each of them, and against plaintiff, effective as of November 20, 1963, which Judgment was entered on the same, identical claim which forms the basis of plaintiff's Complaint For Damages herein.

9. Said Judgment of the United States District Court for the Northern District of Indiana has never been appealed from, nor has it been modified or set aside; it remains in full force and effect and is final and binding, and is *res judicata* as to all issues tendered by plaintiff's Complaint For Damages herein. It is a complete bar to plaintiff's recovery in this action.

10. In support of this motion, defendants tender herewith the Affidavit of Thomas W. Yoder, their duly authorized attorney of record herein and in said proceedings had in the United States District Court for the Northern District of Indiana, the United States Court of Appeals for the Seventh Circuit, and the Supreme Court of the United States. In addition thereto, defendants tender herewith the folfowing EXHIBITS TO MOTION FOR SUMMARY JUDGMENT, to-wit:

Certified Copy of plaintiff's Complaint For Damages in Civil No. 1196 in the United States District Court for the Northern District of Indiana.

Certified copy of the Summons issued by said United States District Court in said Civil No. 1196 and served on defendants, with the Return of the United States Marshal thereon.

Certified copy of defendants' Answer and Additional Affirmative Paragraph of Answer in Civil No. 1196 in the United States District Court.

Certified copy of plaintiff's Motion To Strike in Civil No. 1196 in the United States District Court.

Certified copy of the Order of the United States District Court in Civil No. 1196, dated June 29, 1962, granting plaintiff's Motion To Strike.

Certified copy of the Mandate and Corrected Mandate of the United States Court of Appeals for the Seventh Circuit issued to the United States District Court in Civil No. 1196.

Certified copy of the Order of the Supreme Court of the United States denying plaintiff's Joint Petition For A Writ Of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Certified copy of defendants' Motion For Summary Judgment in Civil No. 1196 of the United States District Court.

Certified copy of the Order of the United States District Court for the Northern District of Indiana, of November 20, 1963, granting defendants' Motion For Summary Judgment in Civil No. 1196.

Certified copy of the Judgment entered by the Clerk of the United States District Court for the Northern District of Indiana, in said Civil No. 1196, in response to said Court's Order of November 20, 1963.

Certified copy of the Judgment Nunc Pro Tunc Amending And Correcting Judgment Entered by The Clerk On November 20, 1963, in Civil No. 1196 of the United States District Court.

11. For the foregoing reasons, there is no genuine issue as to any material fact in this cause and defendants are entitled to judgment in their favor as a matter of law.

WHEREFORE, Defendants separately and severally pray that the Court grant them summary judgment in this cause.

(Tr. in 668 A 101, pp. 132-33)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

ROBERT SLATER, by George Slater, his Father and Next Friend,

Plaintiff,

-vs-

Civil No. 1196

MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased,

THE COMMUNITY STATE BANK, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased,

Defendants.

JUDGMENT NUNC PRO TUNC AMENDING AND CORRECTING JUDGMENT ENTERED BY THE CLERK ON NOVEMBER 20, 1963

Defendants, Mark E. Stoffel, Administrator of the Estate of Bernard J. Stoffel, deceased, and The Community State Bank, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased, having filed herein their verified motion under Rule 60(a), Federal Rules of Civil Procedure, requesting correction of a clerical mistake or error made by the Clerk of this Court on November 20, 1963 in entering judgment in this cause, in failing to provide therein for judgment in favor of defendants and against plaintiff, as directed in the Court's Order of said

date granting defendants' Motion For Summary Judgment herein;

And it appearing to the Court that such clerical mistake or error is apparent on the fact of the record and is the result of oversight or omission on the part of the Clerk in entering judgment herein;

And it further appearing to the Court from the record herein, that plaintiff, Robert Slater, was given due notice of the filing of said motion by defendants, by service of notice thereof, and by service of a copy of said motion, on his duly authorized attorneys of record;

IT IS, THEREFORE, ORDERED and ADJUDGED by the Court that the Judgment entered herein by the Clerk of this Court on November 20, 1963, should be, and said Judgment hereby is, amended and corrected *nunc pro tunc* pursuant to Rule 60(a), Federal Rules of Civil Procedure, by the addition of the following:

IT IS ORDERED and ADJUDGED by the Court that plaintiff take nothing by his Complaint For Damages herein, and judgment is hereby entered in this cause in favor of defendants, and each of them, and against plaintiff; said judgment to be effective as of November 20, 1963.

Note. An identical judgment was entered by the District Court in Civil No. 1197, the *George Slater* Case. (Tr. in No. 668 A 102, pp. 138-39) It has not been included herein in the interest of brevity.

IN THE
APPELLATE COURT OF INDIANA

ROBERT SLATER GEORGE SLATER, *Appellants,*	)	No. 668 A 101
-vs-	)	
MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased,	)	No. 668 A 102
THE COMMUNITY STATE BANK, HUNTINGTON, INDIANA, Administrator of the Estate of Donald H. Stoffel, deceased, *Appellees.*	)	CONSOLIDATED

Appeal from the Kosciusko Circuit Court,
Honorable Gene B. Lee, Judge

APPELLEES' ANSWER BRIEF

Point 7.

A Judgment Rendered Pursuant to Rule 56 of the Federal Rules of Civil Procedure is "On the Merits" and Operates to Bar a Subsequent Action

Appellees' Motions For Summary Judgment * * * in the United States District Court were filed pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Said Rule, in its pertinent parts, provides as follows:

(b) *For Defending Part.* A party against whom a claim * * * is asserted * * * may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceeding Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * *

* * *

(e) *Form of Affidavits.* * * * Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." (28 U.S.C.A., 1960 Ed., at p. 303)

In a host of cases, the question of whether a judgment entered upon a motion, filed pursuant to Rule 56, supra, is "on the merits" and "operates in bar of the cause of action", or simply in "abatement" thereof, has been con-

sidered. Without exception, the cases hold that such a judgment is "on the merits" and "is an effective bar under the doctrine of *res judicata* to a subsequent action between the parties on the same cause of action".

Thus, in *Stokke et al. v. Southern Pacific Co.*, 169 F. 2d 42 (C.A. 10th, 1948), in which the court in a prior action had rendered a general judgment in defendant's favor, pursuant to defendant's motion for summary judgment under Rule 56, the court stated:

> "But here the judgment entered in the earlier case did not merely dismiss the action, on the ground of limitations or otherwise. It was not merely a judgment of nonsuit. It was a general judgment in favor of the defendant and against the plaintiff without specifying or even suggesting any particular ground upon which it was predicated. That was the sweep of the judgment and it must be so taken here. It cannot be modified or narrowed in this suit. It may have been correct insofar as the defense of limitations was concerned and erroneous judgment fairly and regularly entered by a court of competent jurisdiction is nevertheless an effective bar under the doctrine of *res judicata* to a subsequent action between the same parties on the same cause of action. * * * (citing cases) * * * *The action was foreclosed by reason of res judicata.*" (169 F 2d 42, at p. 43) (Emphasis added)

The judgments here in question, rendered in appellees' favor on July 13, 1967, are likewise "general" judgments.

In *Sapp v. Gerlein* et al., 236 F. Supp. 823 (W.D. Pa., 1964), the Court stated:

> "The authorities all agree that the entry of a summary judgment against a plaintiff is a general judgment in favor of a defendant and is an effective bar under the doctrine of *res judicata* to a subsequent

> action between the same parties on the same cause of action. *Stokke v. Southern Pac. Co.*, 169 F. 2d 43 (10th Civ., 1948). *'A judgment under Rule 56 goes to the merits and operates in bar of the cause of action, not in abatement.' Martucci v. Mayer*, 210 F. 2d 259 (3rd Cir., 1954). The issue of *res judicata* 'may be raised on a motion for summary judgment setting up a former judgment between the parties involving the same issue.' *United States v. State of Alaska*, 197 F. Supp. 834 (D.C. Alaska, 1961); *Bros. Incorporated v. W. E. Grace Manufacturing Co.*, 158 F. Supp. 786 (D.C.N.D. Texas, 1958) * * *'' (236 F. Supp. 823, at p. 825) (Emphasis added)

To the same effect is *Curacao Trading Co., Inc. v. Federal Ins. Co.* et al., 3 F.R.D. 203 (S.D. N.Y., 1942).

A judgment rendered pursuant to Rule 56, supra, being a general judgment on the merits, not only precludes the subsequent consideration of all matters considered in the former action, but also of "every matter" which "might" have been considered therein. As stated by the Court in *Holmes v. United States*, 231 F. Supp. 971 (N.E. Ga., 1964) where the effect of such a judgment was under consideration:

> "When a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissible matter which might have been offered for that purpose.* * * * (231 F. Supp. 971, at p. 973) (Emphasis added)

For the foregoing reasons, the judgments rendered in appellees' favor, pursuant to Rule 56, were judgments "on the merits". They are an effective bar to these actions under the doctrine of *res judicata.*

Point 9.

Federal and State Law Requires that the Res Judicata Effect of the Federal Court Judgments be Recognized

Under settled constitutional and statutory principles, it is clear that a State Court must recognize the *res judicata* effect of a judgment rendered by a Federal Court.

A. Federal Statutes

The pertinent Federal Statute is § 1738, 28 U.S.C.A. (1966 Ed.), providing in part as follows:

> "The records and judicial proceedings of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they may have by law or usage in the courts of such State, Territory or Possession from which they are taken." (p. 146)

In *Stoll v. Gottlieb,* 305 U.S. 165, 83 L.Ed. 104 (1938), reh. den. 305 U.S. 675, 83 L. Ed. 437 (1938), the Supreme Court of the United States declared the effect of such a Statute to be:

> "* * * This statute is broader than the authority granted by Article Four, section one, of the Constitution to prescribe the manner of proof and the effect of the judicial proceedings of states. *Under it the judgments and decrees of the Federal courts in a*

*state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances * * *"* (83 L. Ed. 104, at pp. 107-108) (Emphasis added)

When the judgment or decree of a Federal Court, duly authenticated and exemplified as required by § 1738, supra, is presented to a State Court by proper pleading and proof, as was done in these cases, both Federal and Indiana law require that its *res judicata* effect be recognized.

B. Federal Decisions

Inasmuch as it is the Supreme Court of the United States which possesses final authority to review the decision of the highest court of a state denying to a litigant the benefit of a judgment rendered in his favor by a Federal Court § 1257, 28 U.S.C.A. (1966 Ed.), *Donohoe v. Vosper*, 243 U.S. 59, 61 L. Ed. 592 (1917), *Supreme Lodge, K. of P. v. Meyer*, 265 U.S. 30, 68 L. Ed. 885 (1923), and *Dupasseur v. Rocheraus*, 88 U.S. 130, 22 L. Ed. 588 (1875), it is essential to look to the decisions of that Court in determining what effect should be given such a judgment by a State Court.

In the landmark case of *Crescent City Live-Stock Landing and Slaughter-House Company et al. v. Buntchers Union Slaughterhouse and Live-Stock Company*, 120 U.S. 141, 30 L. Ed. 614 (1887), commonly referred to as the "Slaughter House Cases", a trial court in Louisiana, and subsequently the Supreme Court of that State, had refused to recognize the judgment of a Federal Court in Louisiana under which the plaintiffs in error had been granted an injunction which was later dissolved by the Federal Court. After such dissolution of the injunction, plaintiffs in error

were sue for malicious prosecution in a State Court in Louisiana, and in defense of such action attempted to plead and prove the prior Federal judgment for the purpose of establishing that they had "probable cause" for instituting the injunction proceedings in the Federal Court. The Louisiana courts pronounced the Federal judgment "erroneous", and as not in accord with the law of Louisiana, and refused to give it recognition:

> "* * * in the present case the decree of the Circuit Court of the United States was adjudged to be entitled to no effect whatsoever (by the Louisiana courts) as evidence in support of the plaintiffs in error." (30 L. Ed. 614, at p. 618)

In reversing the decision of the Supreme Court of Louisiana, and in holding that the Louisiana courts had erred in refusing to give "due effect" to the Federal judgment, the Supreme Court of the United States made the following observations here pertinent:

> "* * * It may be conceded, then, that the judgments and decrees of the Circuit Court of the United States, sitting in a particular State, in the courts of that State are to be accorded such effect * * * as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. *But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the Supreme Court of Louisiana to the decrees of the Circuit Court of the United States here drawn in question.* (30 L. Ed. 614, at p. 617)
>
> * * *
>
> * * * we are of the opinion * * * that the Supreme Court of Louisiana in this case erred in not giving due effect to the decree in question of the Circuit Court of the United States. The latter is a court co-ordinate to the Supreme Court of Louisiana in authority, and equal in dignity, being the highest fed-

eral court sitting in that State, whose judgments and decrees are final and conclusive, subject only to review and reversal in the Supreme Court of the United States. * * * *And their judgment or decree when rendered is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as a foundation of an action, or of a defense, either by plea or proof, as it would be under any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection of all who act in compliance with its mandate.* * *" (30 L. Ed. 614, at pp. 620-21)

The record of its proceeding imports verity, its judgments cannot be impugned except by direct process from superior authority. The integrity and value of the judicial system, as an institution for the administration of public and private justice, rests largely upon the wholesome principle" (30 L. Ed. 614, at p. 621) (Emphasis added)

To the same effect are:

Hancock National Bank v. Farnum, 176 U.S. 640, 44 L. Ed. 619 (1899);

Embry v. Palmer, 107 U.S. 3, 27 L. Ed. 346 (1882);

Metcalf v. Watertown, 153 U.S. 671, 38 L. Ed. 861 (1893);

Dupasseur v. Rochereau, 21 Wall. 130, 22 L. Ed. 588 (1874).

The same rules prevail in situations where, as in these cases, a Federal Court has interpreted or applied a state

statute in one manner, and, subsequently, a State Appellate Court interprets or applies the same statute in the opposite manner, thereby giving the party against whom the Federal judgment was rendered an excuse for saying that such judgment no longer binds him because the basis therefor has been removed by the subsequent State Court decision.

Thus, in *Deposit Bank of Frankfort v. Board of Councilman* et al., 191 U.S. 499, 48 L. Ed. 276 (1903), the State of Kentucky had enacted a statute known as the "Hewitt Law" which exempted banking institutions from certain *ad valorem* taxes if they followed a specific procedure and paid other taxes in accordance with the provisions of the statute. In 1898, the plaintiff in error, The Deposit Bank of Frankfort, obtained a decree from a Federal Court in Kentucky adjudging that "the Hewitt law constituted an irrevocable contract exempting the bank from taxation". (48 L. Ed. 276, at p. 277) Such adjudication was based in part on the judgment of a trial court in Kentucky, rendered earlier, which was reversed by the Court of Appeals of Kentucky in a decision pronounced *after* entry of the Federal decree.

Following such decision of the Court of Appeals of Kentucky, an action was commenced against the Bank, by the same parties who had been defendants in the earlier Federal Court proceeding, in a State Court in Kentucky, for collection of the tax which the Federal Court had previously determined could not be collected from the Bank because of the exemption afforded by the Hewitt law. The Kentucky courts held that the judgment of the Federal Court was no longer binding, because of the intervening decision of the Court of Appeals of Kentucky interpreting the Hewitt law differently, and refused to give due effect

to the federal judgment upon the Bank's plea of *res judicata.*

In an opinion by Justice Day, the Supreme Court of the United States held that the Kentucky courts were required to give due effect to the Federal decree, notwithstanding such intervening decision of the Court of Appeals of Kentucky, declaring:

> "It is urged that the state judgment upon which the Federal decree of 1898 is based was afterwards reversed by the highest court of Kentucky, and, therefore, the foundation of the decree has been removed, and the decree itself must fall. But is this argument sound? When a plea of *res judicata* is interposed, based upon a former judgment between the parties, *the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself, was it within the jurisdiction of the court, between the same parties, and is it still in force and effect?* The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which, in its terms, embodied settlement of the rights of the parties. *It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were, in the judgment of the court before which the estoppel is pleaded, insufficient, a new judgment could be rendered because of these divergent views, and that whole matter would be at large.* In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be lost in an idle ceremony. *We are*

unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force." (48 L. Ed. 276, at pp. 280-81)

• • •

"It is true that the final determination of the courts that the Hewitt law did not constitute a contract, and the reversal of the state court judgment which was the basis of the decree in the Federal Court, renders the case one where a court might wish to avoid the application of rules which may seem technical. *But the protection of the parties as well as the interest of the public to end litigation by a final judgment, and to preserve inviolate the safeguards of the Federal Constitution, should never be overlooked in view of the hardship of particular cases.*" (48 L. Ed. 276, at pp. 284-85) (Emphasis added)

For the reasons enunciated in the *Frankfort Bank Case*, supra, the fact that this Court interpreted and applied the 1961 Amendments to §§ 7-801, 7-802, supra, differently than did the Federal Court, in that this Court held said amendments to be retroactive, while the Federal Court held twice that they are not, does not, therefore, provide any basis or reason for saying that the final judgments of the United States District Court are not final and binding on appellants.

Were the law otherwise, final judgments would mean nothing, for, to use the language of the Court in the *Frankfort Bank* Case, supra, "nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of parties, would be lost in an idle ceremony." (48 L. Ed. 276, at pp. 280-81)

IN THE

APPELLATE COURT OF INDIANA

ROBERT SLATER GEORGE SLATER, *Appellants,*	)	
-vs-	)	No. 668 A 101
MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased,	)	No. 668 A 102
THE COMMUNITY STATE BANK, HUNTINGTON, INDIANA, Administrator of the Estate of Donald H. Stoffel, deceased, *Appellees.*	)	CONSOLIDATED

APPELLEES' PETITION FOR REHEARING

Appeal from the Kosciusko Circuit Court

Honorable Gene B. Lee, Judge

Appellees, Mark E. Stoffel, Administrator of the Estate of Bernard J. Stoffel, deceased, and The Community State Bank, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased, hereby petition the Court to grant a re-hearing in the above-entitled causes.

Appellees respectfully represent that the Court erred in its opinion and decision in the following respects:

* * *

4. In holding that the judgments of the United States District Court for the Northern District of Indiana, rendered in favor of appellees and against appellants on the same causes of action herein sued upon, on July 13, 1967, on appellants' respective Complaints For Damages filed in said Court on December 2, 1959, were not rendered on the merits. A concise statement of the reasons the decision is thought to be erroneous is as follows: A judgment rendered by a United States District Court pursuant to Rule 56 of The Federal Rules of Civil Procedure, as were said judgments rendered in appellees' favor on July 13, 1967, is a general judgment in favor of the defendant and is an effective bar under the doctrine of *res judicata* to a subsequent action between the same parties to the cause of action. Such a judgment goes to the merits and operates in bar of the cause of action, not in abatement.

5. In holding that the adjudication of the United States District Court for the Northern District of Indiana, holding that appellants' claims asserted in their respective Complaints For Damages herein are barred by reason of their failure to comply with the claim and affidavit requirements of §§ 7-801, 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), and that the provisions of the 1961 amendments thereto, being §§ 7-801 (f), 7-802, Burns' Ind. Stats. (1968 Cum. Supp.), cannot be applied retroactively so as to enable appellees to assert said claims, is not an effective bar to these actions under the doctrine of *res judicata*. A concise statement of the reasons the decision is thought to be erroneous is as follows: A right, question or fact distinctly put in issue and directly determined by a court of compe-

tent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. In appellants' actions filed in the United States District Court for the Northern District of Indiana, the same claims asserted by appellants herein, and appellants' rights with respect thereto under the aforesaid Statutes, were directly put in issue and said claims directly determined adversely to appellants. In making such adjudication, the United States District Court expressly determined that appellants' said claims are barred, and that §§ 7-801(f), 7-802, Burns' Ind. Stats. (1968 Cum. Supp.), cannot be applied retroactively so as to save said claims, and that said amendments do not apply to appellants' causes of action. No appeal was ever taken from such judgments of the United States District Court which stand unmodified.

6. In holding that the judgments of the United States District Court for the Northern District of Indiana, rendered in favor of appellees and against appellants on the same causes of action herein sued upon, on July 13, 1967, on appellants' respective Complaints For Damages filed in said Court on December 2, 1959, are not an effective bar under the doctrine of *res judicata* on the ground that they are based on an erroneous view as to a procedural requirement. A concise statement of the reasons the decision is thought to be erroneous is as follows: When a Federal Court of competent jurisdiction, such as the United States District Court for the Northern District of Indiana, has directly determined a right, question of fact adversely

to a party, such determination must be respected in a subsequent suit between the same parties on the same cause of action; and a State Court in such subsequent suit is bound to respect and follow such determination of the Federal Court, even if in its view the Federal Court determined such right, question or fact erroneously. Under the adjudication of the United States District Court rendered between the parties hereto, appellants' claims are barred by reason of their failure to comply with the claim and affidavit requirements of §§ 7-801, 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), and the 1961 amendments thereto, §§ 7-801(f), 7-802 (1968 Cum. Supp.) cannot be applied retroactively to save said claims. Said adjudications are binding and conclusive between the parties hereto even though this Court may believe they are erroneous.

7. In holding that the judgments of the United States District Court for the Northern District of Indiana rendered in appellees' favor and against appellants on the same claims herein sued upon, on July 13, 1967, on appellants' respective Complaints For Damages filed in said Court on December 2, 1959, were rendered on procedural grounds and are not, therefore, binding on appellants in these State Court actions. A concise statement of the reasons the decision is thought to be erroneous is as follows: Appellants' claims did not fail in the United States District Court for the Northern District of Indiana because of procedural grounds. Said claims failed as a result of said Court's adjudication that they are barred by reason of appellants' failure to comply with the conditions precedent prescribed by §§ 7-801, 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), which constitute a "built-in" part of the right of action itself. Such adjudication was not procedural, but substantive, and resulted in final judgments being

rendered against appellants on the merits of their causes of action.

8. In failing to give full faith and credit to the duly authenticated records and judicial proceedings of the United States District Court for the Northern District of Indiana, submitted in support of appellees' Motions For Summary Judgment which were sustained by the Kosciusko Circuit Court, which records and judicial proceedings establish that the same claims asserted by appellants herein have been adjudged barred by said Court. A concise statement of the reasons said decision is thought to be erroneous is as follows: Under both Statute, § 1738, 28 U.S.C.A. (1966 Ed.) and precedent, the judgments and decrees of Federal Courts in a state are entitled to the same dignity in the courts of that state as those of its own courts in a like case under similar circumstances. Under the circumstances here presented, an adjudication by a State Court in Indiana that a plaintiff's claim is barred by reason of failure to comply with §§ 7-801, 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), standing unreversed, would be conclusive and binding between the parties and a bar to a subsequent suit on the same cause of action.

* * *

WHEREFORE, Appellees separately and severally pray that the Court grant them a rehearing herein.

IN THE SUPREME COURT OF INDIANA

ROBERT SLATER GEORGE SLATER *Appellants,* -vs- MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, de- THE COMMUNITY STATE BANK, HUNTINGTON, INDIANA, Administrator of the Estate of Donald H. Stoffel, deceased, *Appellees.*	)	No. 668 A 101 No. 668 A 102 CONSOLIDATED

APPELLEES' PETITION TO TRANSFER

Appeal from the Kosciusko Circuit Court
Honorable Gene B. Lee, Judge

Mark E. Stoffel, Administrator of the Estate of Bernard J. Stoffel, deceased, and The Community State Bank, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased, appellees in the above-entitled consolidated causes, respectfully show to the Court that:

1. That the judgments of the Kosciusko Circuit Court herein were reversed by the second division of the Appellate Court of Indiana on the 17th day of June, 1969,

and that the Appellate Court decided the case with a written opinion filed on said date.

2. That the decision of the Appellate Court was against appellees, these petitioners.

3. That petitioners filed their application for a rehearing with the Clerk of this Court on the 1st day of July, 1969, which date is within twenty (20) days from the rendition of said decision.

4. That said petition for a rehearing was denied by the Appellate Court on the 14th day of July, 1969, which date is within twenty (20) days before the time of the filing of this petition.

5. That the opinion of the Appellate Court erroneously decides a new question of law in this: that the transcript and assignment of errors present a new question of law which is also presented by the briefs of appellants and appellees, to-wit:

> Whether the judgment of a United States District Court rendered pursuant to the defendants' (appellees') motion under Rule 56, Federal Rules of Civil Procedure, adjudging that the plaintiffs' (appellants') tort claims are barred by reason of failure to comply with §§ 7-801, 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), the Indiana Non-Claim Statute, and further adjudging that the 1961 Amendments thereto, being §§ 7-801(f), 7-802, Burns' Ind. Stats. (1968 Cum. Supp.), cannot be applied retroactively so as to save said claims, operates to bar a subsequent action between the same parties on the same claims in a State Court.

Said question was decided erroneously by the Appellate Court in that it declared the law to be as follows:

"* * * the cause was remanded to the [United States] District Court which entered judgment for the defendants-appellees on the theory that plaintiffs-appellants' claims were barred for failure to file a claim with the court against the decedents' estate within the six-month statutory period provided in §§ 7-801, 7-802, supra. (248 N.E. 2d 378, 379)

* * *

In order that a former judgment may constitute a defense, such judgment must have been on the merits. *Johnson v. Knudson-Mercer Co.* (1906), 167 Ind. 429, 79 N.E. 367; *Guthrie v. Blakely* (1955), 127 Ind. App. 119, 130 N.E. 2d 62, 131 N.E. 2d 357; *Banta v. Banta* (1948), 118 Ind. App. 117, 76 N.E. 2d 698, 77 N.E. 2d 597; *Evansville American Legion Home Association v. White* (1967), —— Ind. App. ——, 230 N. E. 2d 623; 17 I.L.E. *Judgment* § 443, pp. 453-454. The Federal Court judgment was not, in our opinion, rendered on the merits, but was based upon an erroneous view as to a procedural requirement. 58 Am. Jur., *Judgments,* § 348, p. 390; 50 C.J.S. *Judgments,* § 627, p. 52. It was therefore error to grant summary judgments by reason of such Federal Court judgment." (248 N.E. 2d 378, 382)

The reason said question is claimed to be new is as follows: Said question has not been previously decided by this Court, and is a question of first impression in this State.

The reasons said decision of the Appellate Court is thought to be erroneous are as follows:

(a) When a Federal Court of competent jurisdiction, such as the United States District Court for the Northern District of Indiana, has, in the exercise of its diversity jurisdiction, made an adjudication as to a right, question or face distinctly put in issue and directly determined by such Court, such adjudication is final and binding on the parties

and cannot be disputed in a subsequent action between the same parties or their privies in a State Court.

(b) The same tort claims asserted by appellants in their State Court actions herein were by them distinctly put in issue in their respective actions (Tr. Cause No. 668 A 101, pp. 83-86, 87-88; Tr. Cause No. 668 A 102, pp. 82-87, pp. 88-89) filed in the United States District Court for the Northern District of Indiana on December 2, 1959, and were in said actions directly determined against appellants, upon such Court's adjudication that said claims are barred by reason of appellants' failure to comply with §§ 7-801, 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), the Indiana Non-Claim Statute (Tr. in Cause No. 668 A 101, pp. 133-36; Tr. in Cause No. 668 A 102, pp. 126-130), and upon such Court's further adjudication that the 1961 Amendments thereto, §§ 7-801(f), 7-802, Burns' Ind. Stats. (1968 Cum. Supp.), cannot be retroactively applied so as to save said claims. (Tr. in Cause No. 668 A 101, p. 104, ll. 15-22; p. 128, l. 26 to p. 129, l. 19; Tr. in Cause No. 668 A 102, p. 114, ll. 15-22).

(c) Such adjudications of the United States District Court, rendered pursuant to appellees' motions for summary judgment (Tr. in Cause No. 668 A 101, pp. 115-25; Tr. in Cause No. 668 A 102, pp. 125-32) under Rule 56 of The Federal Rules of Civil Procedure, were reduced to general judgments (Tr. in Cause No. 668 A 101, pp. 132-33; Tr. in Cause No. 668 A 102, pp. 138-39) in favor of appellees and against appellants, on the causes of action sued upon, which judgments are an effective bar under the doctrine of *res judicata* to these actions.

(d) The judgments rendered in favor of appellees and against appellants by the United States District Court, under Rule 56 of The Federal Rules

of Civil Procedure, are general judgments on the merits of appellants' claims and are an effective bar to these actions under the doctrine of *res judicata*. Such judgments go to the merits and operate to bar appellants' causes of action, rather than in abatement thereof.

(e) Even if appellants had never put their claims under the 1961 Amendments §§ 7-801 (f), 7-802, Burns' Ind. Stats. (1968 Cum. Supp.), to the Indiana Non-Claim Statute in issue in the Federal Courts, they would still be precluded from maintaining these actions in the State Courts. This is because the doctrine of *res judicata* extends not only to all matters presented and litigated in the prior proceeding, but also to all matters which might have been litigated therein. A litigant may not split or divide his cause of action so as to assert it upon one theory in one court; and, after failure of such action in that court, upon a different theory in a subsequent action in another court.

(f) Under the Constitution and Statutes of the United States, § 1738, 28 U.S.C.A. (1966 Ed.), the duly authenticated judgments and decrees of a Federal Court within a State are entitled to the same full faith and credit in the courts of such State as those of its own courts in a like case under like circumstances. Under both Federal and State law, the adjudications of the United States District Court, adjudging appellants' tort claims barred by reason of their failure to comply with the Indiana Non-Claim Statute, §§ 7-801, 7-802, supra, must be given full faith and credit in appellants' State Court actions. Giving said adjudications such due effect in these actions leads to the conclusion that they are barred.

(g) The adjudications of the United States District Court that appellants' tort claims are barred by reason of their failure to comply with the Indiana Non-Claim Statute, §§ 7-801, 7-802, supra, and said

Court's further adjudication that the 1961 Amendments thereto, §§ 7-801(f), 7-802, supra, cannot be retroactively applied so as to save said claims, must be given full faith and credit even though the Appellate Court deems them to be "erroneous." Said adjudications cannot be impeached in any other court on the ground that they are "erroneous" or based upon a mistake of law.

(h) The fact that a State Court subsequently interprets and applies a State Statute differently than did a Federal Court, in a prior action between the same parties on the same cause of action, affords no lawful basis for avoiding the prior judgment of the Federal Court; nor does it afford any lawful basis for holding the Federal Court's judgment erroneous, or for refusing to give full faith and credit to such judgment in a subsequent State Court action.

WHEREFORE, Appellees respectfully petition this Court to transfer these consolidated causes to the Supreme Court and to set aside and annul said erroneous judgment of the Appellate Court, and to pronounce such judgment and opinion as shall be found proper after a full consideration of the case.